Mohamad Radhi b. Yaakob v. Public Prosecutor, [1991] 3 MLJ 169 the Supreme Court had this to say:

> We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. Public Prosecutor* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case.

I cannot say I am satisfied that the explanation of the accused has not cast a reasonable doubt on the prosecution's case. And the accused is therefore acquitted and discharged.

RE: SOH AH WAH; EXPARTE: DEVELOPMENT & COMMERCIAL BANK BERHAD

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[BANKRUPTCY NO. D2-29-4382-90]
30 MARCH 1992

PRACTICE & PROCEDURE: Application to rescind and annul adjudication and receiving orders - When affidavit verifying truth of creditor's petition should be filed - Whether adjudication and receiving orders can be made on debt of uncertain amount - Whether any oppression or extortion by judgment creditor - Whether any abuse of the process of Court by judgment creditor to obtain a collateral advantage - Consideration of r. 26 of the Companies (Winding-up) Rules 1972 - r. 106 & r. 108 of the Bankruptcy Rules 1969.

This was an application to annul and rescind adjudication and receiving orders made against the judgment debtor on 5 August 1991.

The debtor's liability arose from a guarantee executed in favour of the judgment creditor. Summary judgment under O. 14 of the Rules of the High Court 1980 (RHC 1980) was granted against the debtor and principal borrower but a stay of execution was granted to the principal borrower by reason of the principal borrower's counterclaim against the judgment creditor. The debtor contended that the creditor's petition was filed against him to compel him to use his influence with the principal borrower to withdraw the counterclaim against the judgment creditor. Correspondence between the parties averred to the withdrawal of the principal borrower's counterclaim as being one of the conditions allowing the debtor time to settle. 3 days before the hearing of the petition the judgment creditor had faxed a draft letter to the debtor to be issued by the principal borrower indicating the principal borrower's intention to withdraw its counterclaim. The judgment creditor explained that in order to obtain their agreement to an adjournment of the creditor's petition, the debtor stated he would try to get the principal borrower to withdraw its counterclaim and the faxed draft letter was the result of the debtor's oral promise. At the hearing of the creditor's petition, Counsel for the petitioning creditor indicated that the judgment creditor had received RM140,000 from the debtor and the adjudication and receiving orders were made on the outstanding balance of RM290,000.

The debtor disputed the amount and claimed it was only RM285,537.01. The petitioning creditor maintained that the amount stated by the debtor was incorrect and confirmed the amount at RM333,083.17.

Held:

[1] Unlike r. 26 of the Companies (Winding-up) Rules 1972, which provides that the affidavit verifying the truth of the petition is presented and filed within 4 days of such presentation, there is no such corresponding rule governing the swearing and filing of an affidavit verifying the truth of a creditor's petition on bankruptcy proceedings against an individual. Rule 106(1) of the Bankruptcy Rules 1969 merely states that a creditor's petition shall be verified by affidavit. However, r. 108 goes further to provide that "after the presentation of the creditor's petition and before resealing the copies of the petition for service, the statement in the petition shall be investigated by the Registrar and where some of the statements in the petition cannot be verified by affidavit, witnesses may be summoned to prove the same." These rules seem to suggest that the affidavit should be filed before the Court seals the petition but for practical purposes, the Court considered that the petition should be accompanied by an affidavit and since there was no time frame when the affidavit should be sworn, it could be sworn before or on the same date as the petition was dated and presented.

[2] As a debtor must know exactly the full extent of his indebtedness, and on the facts appearing as at 5 August 1991, the debtor was not made aware of the actual extent of his indebtedness, the Court considered that on that ground alone the adjudication and receiving orders should not have been made.

[3] The extortion plea in bankruptcy proceedings is nothing more than a plea that Court proceedings may not be used or threatened for the purpose of obtaining a collateral advantage and that such use or threat may amount to abuse of process. When such a plea is raised the Court will look to the creditor's conduct since bankruptcy proceedings are a potential instrument of oppression and if oppression for the purpose of obtaining some collateral advantage is shown, the Court will find extortion and debar the creditor from using the process he has abused.

[4] There was no necessity for the judgment creditor to fax such a letter on the principal borrower's own letterhead. That could have been done by the principal borrower itself. The fact that the judgment creditor had acted so amounted to the judgment creditor exercising some form of pressure on the debtor to exercise his influence to get the principal borrower to withdraw the counterclaim. This was a form of extortion which is a defence in bankruptcy proceedings and on that finding the Court considered that the adjudication and receiving orders should not have been granted on 5 August 1991.

[Debtor's application allowed with costs. Adjudication and receiving orders of 5 August 1991 annulled and rescinded].

[Ed. Note: The judgment creditor appealed against the decision of the learned Judge vide Civil Appeal No. 02-396-91 but subsequently withdrew the appeal on 30 June 1994].

Legislation referred to:
Bankruptcy Rules 1969, rr. 106(1), 108
Companies (Winding-Up) Rules 1972, r. 26

For the applicant - M. Pathmanathan M/s. Yusuf Lee Pathma & Marbeck
For the respondent - N. Nadkarni (Aznam bin Mansor with him); M/s. Skrine & Co.

JUDGMENT

Siti Norma bte Yaakob J:

On 5 August 1991, the judgment debtor in these proceedings was adjudged a bankrupt and in applying to rescind and annul the adjudication and receiving orders, the following issues were raised.

1. When should the affidavit verifying the truth of the creditor's petition be filed?
2. Can adjudication and receiving orders be made on a debt the amount of which is uncertain?
3. Has there been any sharp practice by the judgment creditor leading to an abuse of the process of Court?

Unlike r. 26 of the Companies (Winding-Up) Rules 1972, which provides that the affidavit verifying the truth of the petition, for the winding-up of a Company, must be sworn after the petition is presented and filed within 4 days of such presentation, there is no such corresponding rule governing the swearing and filing of an

affidavit verifying the truth of a creditor's petition on bankruptcy proceedings against an individual.

Rule 106(1) of the Bankruptcy Rules 1969, merely states that a creditor's petition shall be verified by affidavit. However, r. 108 goes further to provide that "after the presentation of the creditor's petition and before resealing the copies of the petition for service, the statement in the petition shall be investigated by the Registrar and where some of the statements in the petition cannot be verified by affidavit, witnesses may be summoned to prove the same". These rules seem to suggest that the affidavit should be filed before the Court seals the petition but for practical purposes, I consider that the petition should be accompanied by an affidavit and since there is no time frame when the affidavit should be sworn, it can be so sworn before or on the same date as the petition is dated and presented.

At the hearing of the creditor's petition,Counsel for the petitioning creditor did indicate that her client had received RM140,000 from the debtor and that the balance outstanding was RM290,000 and it was on this outstanding balance that the adjudication and receiving orders were made.

In an affidavit supporting his application, the debtor disputes the amount outstanding as at 5 August 1991 to be RM290,000 and claims that it was only RM 285,537.01. In reply the petitioning creditor maintains that the outstanding amount as stated by the debtor is incorrect and that the correct amount was RM333,083.17. It would appear that I had also been misled by Counsel for the petitioning creditor when she categorically stated that the amount outstanding as at 5 August 1991 was RM 290,000 and not approximately RM 290,000. As a debtor must know exactly the full extent of his indebtedness, and on the facts appearing as at 5 August 1991, the debtor was not made aware of the actual extent of his indebtedness, I consider that on this ground alone, the adjudication and receiving orders should not have been made on 5 August l991.

The debtor's liability on the judgment debt arose from a guarantee which he had executed in favour of the judgment creditor. The judgment debt was a summary judgment under O.14 against the debtor and the principal borrower but a stay of execution was granted in favour of the principal borrower by reason of a counter claim which the principal borrower has against the judgment creditor. It is the debtor's contention that the creditor's petition filed against him is an attempt to extort his influence to have the principal borrower's counter claim withdrawn against the judgment creditor.

The extortion plea in bankruptcy proceedings is nothing more than a plea that Court proceedings may not be used or threatened for the purpose of obtaining a collateral advantage and that such use or threat may amount to abuse of process. When such a plea is raised, the Court will look to the creditor's conduct since bankruptcy proceedings are a potential instrument of oppression and if oppression for the purpose of obtaining some collateral advantage is shown, the Court will find extortion and debar the creditor from using the process he has abused.

Correspondence between the parties from January to April 1991, have averred to the withdrawal of the principal borrower's counterclaim as being one of the conditions allowing the debtor time to settle by 31 December 1991. In reply the debtor has pleaded that he was in no position to influence the principal borrower to withdraw its counterclaim against the judgment creditor, as he had resigned as a Director of the principal borrower's company. Nonetheless, on 3 August 1991, 3 days before the hearing of the petition, the judgment creditor had faxed to the debtor a draft letter to be issued by the principal borrower indicating the principal borrower's intention to withdraw its counterclaim against the judgment creditor. The judgment creditor has explained that in an attempt to obtain their agreement to an adjournment of the creditor's petition on 5 August 1991, the debtor had stated that he would try to get the principal borrower to withdraw its counterclaim and the draft letter of withdrawal of the counterclaim which the judgment creditor had faxed to the debtor was as a result of the debtor's oral promise. If this is true, there is no necessity for the judgment creditor to fax such a letter on the principal borrower's own letter head. That could be done by the principal borrower itself. The fact that the judgment creditor had acted so, amounts to the judgment creditor exercising some form of pressure on the debtor to exercise his influence to get the principal borrower to withdraw the counterclaim. This is a form of extortion which is a defence in bankruptcy proceedings and on that finding, I had considered that in the circumstances of this case, the

adjudication and receiving orders should not have been granted on 5 August 1991. With this conclusion, I had allowed the debtor's application with costs and annulled and rescinded the adjudication and receiving orders made against him on 5 August 1991.

SA-MAL (SABAH) CORPORATION SDN. BHD.

v.

DIRECTOR OF LANDS AND SURVEYS, SABAH

HIGH COURT, KOTA KINABALU
TUAN IAN H.C. CHIN J.
[ORIGINATING MOTION NO. K4 OF 1992]
9 FEBRUARY 1994

LAND LAW: Appeal - Land Ordinance (Sabah) s. 41(1) - Appeal against decision of respondent not to alienate land - Whether decision thereof appealable - Whether appeal prohibited by s. 41(1)(d) of the Ordinance - Appeal filed more than thirty days after decision made by respondent - Whether out of time.

This was an appeal by the appellant under s. 41(1) of the Land Ordinance (Sabah) against the decision of the respondent refusing to issue the offer to alienate certain parcel of land to the appellant.

The facts were that on 29 February 1982, the respondent offered to alienate 225 acres of land (the said land) to one Ko-Nelayan, which Ko-Nelayan accepted by paying 25 % of the premium payable therefor on 3 November 1982. About a year later, the appellant applied for 50 acres to be excised from the said land and on 19 September 1984, the application was forwarded by the land office to the respondent.

The appellant solicited the help of the Chief Minister, Sabah, to get the necessary approval for their application, and on 24 January 1984, the Secretary of the Natural Resources (the Secretary), Chief Minister's Office, informed the appellant by letter that the application could be approved on certain terms and conditions.

However, at the direction apparently of the Secretary, the respondent subsequently issued two seperate titles in respect of the said land to Ko-Nelayan giving Ko-Nelayan a lease of sixty years effective 1 January 1985 over the said land. Ko-Nelayan later refused to part with the 50 acres or to comply with any of the terms and conditions laid down in the letter of 24 January 1984. The appellant nonetheless maintained that the Secretary's letter of 24 January 1984 constituted an approval by the State Government of their application for the 50 acres and subsequently demanded that the respondent issue them the offer to alienate the said 50 acres.